SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

(IN THE ALL SCOTLAND SHERIFF COURT)

[2017] SC EDIN 72

[Case No]

NOTE BY SHERIFF PETER J BRAID

In the cause

ROBERT BURNS

Pursuer

Against

(FIRST) HAMILTON & FORBES LIMITED, 60 Hyde Park Street, Glasgow, G3 8BS; (SECOND) JAMES HARRISON & COMPANY (BUILDERS) LIMITED, Pardovan, Philipstoun, West Lothian, EH49 6QZ; (THIRD) CARILLION CONSTRUCTION (CONTRACTS) LIMITED, Carillion House, 84 Salop Street, Wolverhampton, WV3 OSR

Defenders

Act: Brodie, QC; Alt (for 1st and 2nd defenders: Bennet; (for 3rd defenders: McGregor)

Edinburgh, 26 October 2017

[1] The pursuer's motion 7/6 of process called before me on 16 October 2017. Stated briefly, the pursuer moved the court to interpone authority to a joint minute in settlement of the action, and thereafter (i) to certify certain skilled witnesses and (ii) to grant sanction for the employment of junior, and senior, counsel. The motion was opposed by all three defenders only as regards sanction for the employment of senior counsel.

The Statutory Test

[2] Section 108 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act") provides:

"**108 Sanction for counsel in the sheriff court and Sheriff Appeal Court**

(1) This section applies in civil proceedings in the sheriff court or the Sheriff Appeal Court where the court is deciding, for the purposes of any relevant expenses rule, whether to sanction the employment of counsel by a party for the purposes of the proceedings.

(2) The court must sanction the employment of counsel if the court considers, in all the circumstances of the case, that it is reasonable to do so.

(3) In considering that matter, the court must have regard to—

(a) whether the proceedings are such as to merit the employment of counsel, having particular regard to—

(i) the difficulty or complexity, or likely difficulty or complexity, of the proceedings,

(ii) the importance or value of any claim in the proceedings, and

(b) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.

(4) The court may have regard to such other matters as it considers appropriate.

(5) References in this section to proceedings include references to any part or aspect of the proceedings.

(6) In this section—

"counsel" means—

(a) an advocate,

(b) a solicitor having a right of audience in the Court of Session under section 25A of the Solicitors (Scotland) Act 1980,

"court", in relation to proceedings in the sheriff court, means the sheriff,

"relevant expenses rule" means, in relation to any proceedings mentioned in subsection (1), any provision of an act of sederunt requiring, or having the effect of requiring, that the employment of counsel by a party for the purposes of the proceedings be sanctioned by the court before the fees of counsel are allowable as expenses that may be awarded to the party.

(7) This section is subject to an act of sederunt under section 104(1) or 106(1).

[3] Section 108 has been the subject of consideration by the Sheriff Appeal Court in *Cumming* v *SSE Plc* [2017] SAC (Civ) 17; 2017 Rep LR 82. The Court confirmed that the test

was one of objective reasonableness considered at the time of the motion, in all the circumstances of the case, having regard in particular to the matters specified in section 108(3) (see paragraphs 12 and 13 of the Court's opinion). If the court considers that the reasonableness test is met, then it has a positive duty to grant sanction.

The nature and history of the action

[4] I take the following summary largely from the history contained within senior counsel's written submission for the pursuer, which I did not understand to be contentious. This was an action for damages in which the pursuer averred he had developed asbestos-related injuries due to exposure to asbestos during the periods he was employed by each of the three defenders. He was employed by the first defenders between 1962 and 1969 as an apprentice joiner, primarily engaged in shopfitting at a variety of locations in Glasgow and, for a period, at Fairfield Shipyard. He was then employed by the second defenders between 1970 to 1972 as a joiner engaged in the construction of new houses in Hamilton. He was then employed by the third defenders between 1975 and 1978 as a joiner in the construction of houses at various sites. In addition, he was employed by McGhee Murray Limited, a subcontractor of the third defenders, between 1971 and 1974 and between 1977 and 1979, at a number of locations including Glasgow Airport. The pursuer averred, and contended as a matter of law, that McGhee Murray Limited worked to the direction and control of the third defenders; thus they were not independent contractors and the third defenders remained his *de facto* employers and were liable for any breach of duty during employment with McGhee Murray. In each of these periods of employment, the pursuer averred that in breach of duties incumbent upon the defenders he was exposed to asbestos. As the nature of his

duties and locations of employment varied considerably over the period of time he worked with each of the defenders, the level and nature of exposure also varied.

[5] The pursuer averred that he had been diagnosed with pleural plaques as a result of asbestos exposure. His position was also that he was diagnosed as being at a very material risk (35%) of developing an asbestos-related lung cancer. He was also assessed in light of his history of asbestos exposure as having a 5% risk of developing mesothelioma and non-negligible risks of developing pleural thickening and asbestosis. He sued for full and final damages, or, in the alternative, provisional damages.

[6] A four day diet of proof on liability and quantum was assigned for Tuesday 20 June 2017. Until the pre-trial meeting on 6 June 2017 junior counsel was instructed for the pursuer. No settlement was achieved at that meeting and at the conclusion of it, although the first and second defenders had admitted liability, they had not agreed that the pursuer was at risk of asbestos-exposure related lung cancer, mesothelioma, pleural thickening or asbestosis. The third defenders continued to deny everything other than their designation. In addition, the defenders continued to dispute apportionment of any damages awarded, *inter se.* No offer was forthcoming at the pre-trial meeting.

[7] It was following the failure to achieve settlement at the pre-trial meeting and with all issues of fact and law being at large for proof (other than to the extent stated above) that the pursuer decided to instruct senior counsel on 7 June to advise and prepare for proof. According to senior counsel for the pursuer, subsequent discussions between him and the third defenders' counsel revealed that the questions of employment by the third defenders for the period averred, liability for employment with McGhee Murray Limited, the nature and quantity of exposure with each of the defenders and the risk of other asbestos-related conditions were all to be the subject of cross-examination.

[8] On Thursday 15 June 2017, the third defenders admitted the diagnosis of pleural plaques and employment for a proportion of the period averred by the pursuer. The defenders tendered on Friday 16 June and the case settled on 19 June. The proportions attributable to each defender were: 74.16% to the first defenders; 1.14% to the second defenders and 24.70% to the third defenders.

Submissions for the pursuer

[9] Under reference to section 108 of the 2014 Act, senior counsel for the pursuer submitted that it was reasonable to sanction the employment of senior counsel having regard, in particular, to the difficulty and complexity of the proceedings and, secondly, the importance of the claim to the pursuer. Following the pre-trial meeting, it was necessary to prepare for a proof in respect of all of the following matters of fact and law:

i. the fact, and time periods, of employment with the third defenders and their subcontractor McGhee Murray Limited;
ii. the nature of the control and direction by the third defenders over McGhee Murray Limited and whether as a matter of fact and law they were a subcontractor for whom the third defenders were vicariously liable;
iii. the nature and quantity of asbestos exposure, being the actual level of asbestos fibres to which the pursuer was exposed, whilst in the employment of the first and second defenders *et separatim* the third defenders and McGhee Murray. As illustrated by the opinion of the Lord Ordinary in *Prescott* v *The University of St Andrews* [2016] CSOH 6, this was a detailed exercise which would have required taking the pursuer through 27 years of asbestos exposure at a large number of different sites, doing different types of work. The pursuer's engineering expert would require to give

evidence as to the likely asbestos fibre release at each of the various work sites and tasks in order to give evidence as to exposure levels (in contrast with the more common asbestos-related industries such as shipbuilding, where there was more general acceptance of exposure levels). Taking such evidence would be a tricky exercise requiring much forensic skill. The exposure levels were also relevant to the pursuer's medical expert's opinion as to whether an asbestos-related lung cancer was a significant risk for the pursuer;

iv. whether any exposure during employment with the third defenders *et separatim* McGhee Murray were in breach of the duties incumbent upon them at the material time;

v. whether the pursuer suffered from pleural plaques and if so whether that was caused by negligence and/or a statutory breach (the third defenders admitting diagnosis of pleural plaques only on 15 June 2017);

vi. the risk of the pursuer developing asbestos-related lung cancer, in the context of his being a smoker, which had a synergistic affect with asbestos exposure, thereby increasing the risk. This would have entailed complicated epidemiological evidence. There was also an issue as to whether this was a recoverable loss, since authority diverged as to whether one must establish that exposure to asbestos had doubled the risk (e.g. *Jones* v *Secretary of State for Energy and Climate Change* [2012] EWHC 2936), or whether it was sufficient to show material contribution (*Sinkiewicz* v *Grief UK Limited* [2011] 2AC 229);

vii. whether the pursuer would develop pleural thickening, asbestosis and mesothelioma;

viii. apportionment of damages. The defenders argued that they were each only liable for the time during which they had negligently exposed the pursuer to asbestos following the Supreme Court decision in *Barker* v *Corus Limited* [2206] 23AC 572. The pursuer argued that liability was not limited in that way and that the defenders were jointly and severally liable, following the descending speech of Lord Rodger as to the position in Scotland in *Barker*, followed by Lord Uist in *Wright* v *Stoddart International Plc* 2008 Rep LR 2;

In addition to all of those issues, the pursuer also required advice on the difference between full and final damages and provisional damages.

[10] Senior counsel submitted that even if none of the foregoing issues were difficult or complex enough individually to render the employment of senior counsel reasonable, it was the combination of all the circumstances that did so. It had been reasonable not to instruct senior counsel prior to the pre-trial meeting, but when it became evident that the matter would not settle, that was absolutely the time to decide that the skill-set of senior counsel was relevant. Importance to the pursuer also carried some weight, given the risk of his developing other conditions. Sanction should therefore be granted.

Submissions for the first and second defenders

[11] Counsel for the first and second defenders submitted that it was not reasonable to sanction the employment of senior counsel. Many cases such as this got by with junior counsel. The first and second defenders had instructed junior counsel. *Cumming* almost mirrored the present case in that it, too, was a pleural plaques case involving the same sort of issues as this case. Those issues, which typically arose in all such cases, included levels of exposure, periods of employment, breach of duty, and damages including alternative claims

for provisional and full and final damages. In *Cumming*, only junior counsel had been sanctioned. At the pre-trial meeting, the first and second defenders admitted negligent exposure and breach of duty. The risks of return conditions were not discussed as the defenders had only received a supplementary report on the eve of the meeting. It would not have been particularly difficult to have taken the pursuer's evidence, nor would the expert evidence have been any more difficult to lead than in any other pleural plaques case. The level of percentage risk of developing asbestos-related lung cancer did not make the case any more difficult. The defenders had not proposed to lead any contradictory evidence. Any experienced junior counsel could have dealt with all of the issues perfectly competently. As regards full and final/provisional damages, *Harris* v *Advocate General for Scotland* 2016 SLT 572 and other cases provided clear guidance. Junior counsel ought to have been able to explain the difference between the two types of damages to the pursuer, and advise on quantum. As regards importance to the pursuer, the claim was no more important to him than to any other pursuer with a percentage risk of a return condition. Junior counsel conducted the pre-trial meeting and should have been able to deal with the proof from there.

Submissions for the third defender

[12] Counsel for the third defenders adopted the submissions of counsel for the first and second defenders. Under reference to the statutory test, he drew attention to the terms of section 108(4), entitling the court to have regard to such other matters as it considered appropriate. One such matter in the present case was the instruction of junior counsel up to the point of the pre-trial meeting. If junior counsel had no difficulty in dealing with the issues till then, he ought to have had no difficulty in preparing for and conducting the proof.

It had not been shown why over and above the skill-set of junior counsel it was reasonable to parachute in a senior. The onus was on the pursuer, standing the statutory test, to establish that it was reasonable to sanction senior counsel. This case was no different from any other pleural plaques case. Ultimately, the third defenders' position was simply that they were putting the pursuer to his proof. Junior counsel would have been more than capable of leading the factual evidence and presenting the necessary arguments on causation and apportionment as well as taking the experts to their reports and advising on damages, which was now almost a formulaic test.

Response by senior counsel for the pursuer

[13] Senior counsel for the pursuer submitted that it was curious to criticise the pursuer for his efficiency in not having instructed senior counsel before the pre-trial meeting. As regards senior counsel's particular skill set, it came down to greater experience and skill in leading evidence, both factual and expert, of a type that was very regularly taken in the Court of Session, and in presenting legal argument.

Discussion

[14] I bear in mind that the test is one of objective reasonableness viewed at the time of the motion, rather than whether it was subjectively reasonable for the pursuer to instruct senior counsel following the pre-trial meeting. It is also important to bear in mind that the test is reasonableness, not necessity. Accordingly, while it may well be true that many competent junior counsel could have conducted the proof, it does not follow that it is not reasonable to sanction the employment of senior counsel, any more than that it would not be reasonable to sanction junior counsel in a case which might be capable of being conducted

by some solicitors. The real issue is whether the issues which remained live at the time of instruction merited the employment of senior counsel. That involves consideration of the difficulty and complexity of those issues and whether they were such that the skill and experience of senior counsel would bring something to the table, as it were. Having regard to the matters identified by senior counsel for the pursuer, it seems to me that, in combination, they were complex enough to merit the use of senior counsel. I accept that it would not have been easy to elicit all the evidence in a cogent and convincing manner. I also accept that there were difficult and possibly far-reaching legal arguments to be made. That is not determinative of the issue, of course, since I am also directed by section 108 to have regard to the value of the claim[1]. Just as a high-value claim may point towards the granting of sanction, so may a low-value claim point in the opposite direction, no matter how complex the arguments may be. I was not particularly attracted by senior counsel's argument that in reality the value was higher because the claim was valued by taking a percentage of a higher figure. What is relevant is the value of the actual claim, not some higher figure which operates as the starting point for the valuation. However, I can take into account that the potential value of the claim was probably higher than the figure for which the case actually settled. It also seems to me that the nature of the claim is also relevant, whether under the category of importance to the pursuer or as another circumstance to be taken into consideration. It is more likely that the employment of senior counsel will be reasonable in a case where the pursuer is at risk of developing a disease such as lung cancer, and is looking to be compensated appropriately, than in a claim of similar value for, say, breach of contract or, in a personal injuries context, damages for, say, a

[1] In fact, section 108(3)(a)(ii) refers to importance *or* value, but it is not contentious that where a claim has a low value, that must be a relevant consideration which might point against the grant of sanction, no matter how important the claim may be.

broken leg, no matter how complex the case may be. It is also relevant to take into account that senior counsel was instructed only after a pre-trial meeting at which the third defenders, in particular, made it plain that they were not prepared to settle the action. In my view, if defenders take that stance at a pre-trial meeting (the purpose of which is to establish whether settlement is possible after all parties are, or ought to be, fully prepared for proof), they cannot thereafter be heard to complain if a pursuer takes the view, in a sufficiently complex case (such as this), that counsel, or as in this case senior counsel, ought to be instructed, to enhance his prospects of success. The point might also be made that senior counsel did bring something to the table: he secured the settlement which the defenders had previously said they would not enter into.

[15] For completeness, I will deal with three other arguments advanced by the parties. First, it is nothing to the point that in *Cumming*, only junior counsel was sanctioned. Senior counsel was not instructed in that case. The court did not hold that the case was not suitable for senior counsel: that point was simply not considered. Second, I do not follow the argument that it is not reasonable to instruct senior counsel because junior counsel dealt with the case to the point of the pre-trial meeting. If that argument were correct, it would never be reasonable to instruct counsel after a case had begun. In the present case, in any event, it may well not have been reasonable to instruct junior counsel at a significantly earlier stage. One of the factors that made it reasonable was the (apparent) certainty of the case going to proof after it had failed to resolve at the pre-trial meeting. Finally, I did not consider it relevant that senior counsel is accustomed to dealing with cases such as this in the Court of Session. The legal landscape has changed with the passing of the 2014 Act. As a consequence cases such as this require to be litigated in the sheriff court. It would to some extent defeat one of the aims of the legislation were sanction to be granted simply because

senior counsel had dealt with such cases in the past. The over-arching question is always whether the employment of counsel is reasonable. The skill and experience of senior counsel, derived from years of practice in the Court of Session, is doubtless a relevant consideration, but the real question is whether it is reasonable to sanction the use of that skill and experience (which, of course, must be paid for) in the particular circumstances of the case.

Decision

[16] For the foregoing reasons, I have reached the view that in all the circumstances of this case, and having regard to the particular circumstances specified in section 108(3), it is reasonable to sanction the case as suitable for the employment of senior counsel. That is not to say it will always be reasonable to sanction the use of senior counsel in a pleural plaques case. As I hope I have made clear, every case must turn on its own facts and circumstances, and the reasonableness of granting sanction in the present case derives from a somewhat unusual combination of circumstances.

[17] I am conscious that some (although by no means all) of the factors which have led me to grant sanction for senior counsel are solely attributable to the third defenders. This may appear harsh in relation to the first and second defenders, although given that the parties have otherwise agreed settlement of the action, including the respective proportions in which the defenders are to meet the principal sum and expenses, it is not immediately obvious that anything can be done about that. Nonetheless, as I indicated at the hearing, I have confined myself at this stage to granting only that part of the motion which seeks sanction for senior counsel, and *quoad ultra* I have continued the motion to 13 November 2017, to enable parties to make such further submissions as they wish. If the first and second

defenders come to the view that they do not wish to make any further submissions, the clerk should be notified and the remainder of the motion can be granted administratively.